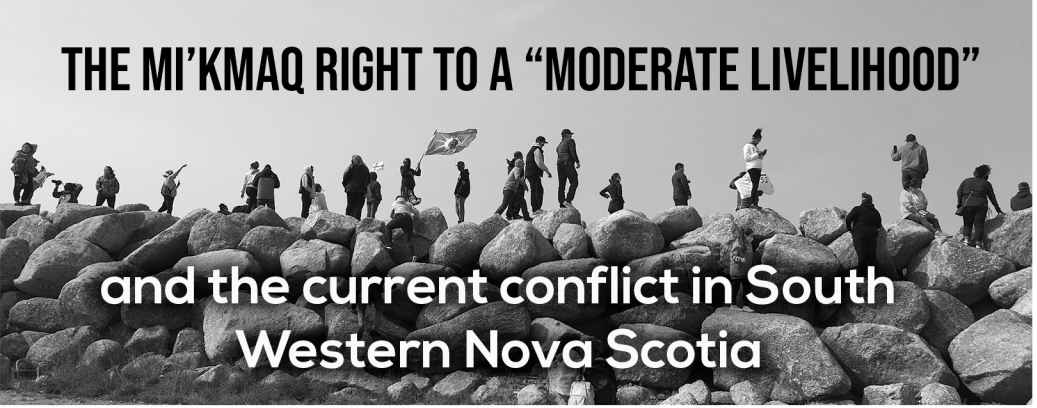
THE MI'KMAQ RIGHT TO A "MODERATE LIVELIHOOD"



and the current conflict in South Western Nova Scotia

Tensions are high in the Digby area of Nova Scotia, as non-Indigenous fishermen have organized in large numbers to intimidate, cut and take the lobster traps of Mi'kmaw small-scale fishers. Tension has been escalating since September 15, when non-Indigenous fishermen constructed a wall of lobster traps on the Saulnierville Wharf to prevent Mi'kmaw fishers from accessing their boats.

Two days later – on the 21st anniversary of the Marshall Supreme Court decision – Sipekne'katik First Nation launched a "moderate livelihood" fishery, issuing 5 licenses for 50 lobster traps each. The Mi'kmaw fleet has been repeatedly harassed and threatened by over a hundred non-Indigenous fishermen, both from their boats and on the wharf. On the water, fishermen have cut their traps and fired flares directly at Mi'kmaq boats. Meanwhile on land, sharpened bolts were placed around the wharf parking area to intentionally pop the tires of fishers and supporters. Mi'kmaq rights holders are also reportedly being denied service in stores and businesses buying Mi'kmaq harvested lobster are being targeted, while violent threats against Mi'kmaq rights holders circulate across social media platforms. In response, the Assembly of Nova Scotia Mi'kmaw Chiefs have declared a State of Emergency due to political unrest for the whole of the mainland of Nova Scotia.

MARSHALL DECISION

R. v. Marshall was a Supreme Court case that established the Treaty right to fish after Donald Marshall Jr., a Mi'kmaw man from Membertou First Nation in Sydney Nova Scotia, was arrested in 1993. He was arrested for catching and selling eel without a licence, with an "illegal" net, and during an off-season. He was then wrongfully charged under the federal Fisheries Act and the Maritime Provinces Fishery Regulations and was found guilty on all three counts.[1]

However, in 1999 the Supreme Court of Canada reversed this decision. The Supreme Court finally recognized Marshall's Treaty rights under the Peace and Friendship Treaties and interpreted them as the right to a "moderate livelihood" from fishing. Despite the court reversing Marshall's convictions, a "moderate livelihood" has never been fully defined by the courts, but was distinguished from the concept of "bare subsistence" and included "food, clothing and housing, supplemented by a few amenities".[2]

To support Mi'kmaw Fishers on the ground in Saulnierville, send e-transfers and paypal payments to: monicah@sipeknekatik.ca

TREATY RIGHTS

Aboriginal title and rights are protected under the Constitution Act, 1982 – the highest law in Canada's legal system. These rights include the right to hunt and fish unhindered and the inherent right to self-governance. While the right to hunt and fish is collectively held, it is exercised by individuals, and deals made between band councils and the Department of Fisheries and Oceans do not extinguish these rights. Specifically, the 1752 Peace and Friendship Treaty states that "it is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual".

CONSERVATION ISSUES?

Mi'kmaq fishing effort makes up a small proportion of the lobster fishing industry. Non-indigenous commercial fishermen are provided 375 trap tags per license, and hold approximately 985 licences in Lobster Fishing Area (LFA) 34. By comparison, the Sipekne'katik First Nation gave out 50 tags each to 7 licenses valid for 3 months.[3] In total, there are an estimated 60 Mi'kmaq harvesters who are currently lobster fishing in the Bay of Fundy and St. Mary's Bay off the coast of Nova Scotia.[4] They account for less than 1% of the industry in terms of trap numbers and should have a minimal impact on lobster populations.

While the 1999 Marshall decision does leave the door open for Canada to step in to regulate Mi'kmaq fishing for conservation purposes, this infringement would need to be justified by meeting the Sparrow Test. This test looks at whether the effect of the restriction unnecessarily infringes the interests protected by the Aboriginal right. It also requires that "the Aboriginal right be given priority over the interests of other groups"[5], that there is as little infringement as possible, and that First Nations are consulted, and compensated, if necessary."

Currently, Clearwater has "a year-long season and no trap limit"[6] in LFA 41. This vertically integrating fishing corporation has also been charged with leaving traps unattended for weeks on end, which DFO called a "serious conservation risk". According to the Ecology Action Centre, LFA 41 is where many of the biggest breeding female lobsters that support the inshore populations are found[7]. Given that the Supreme Court has acknowledged that Mi'kmaq rights should be given priority over groups like Clearwater, it seems unlikely that a court would rule that Mi'kmaq should not have year-round access, while Clearwater does.

The Marshall decision states that "the complexities and techniques of fish and wildlife management vary from species to species and restrictions will likely have to be justified on a species-by-species basis."[8] As lobster populations in Nova Scotia are currently healthy, proving the need to restrict access to Mi'kmaq rights holders is simply unwarranted. The Sparrow test also suggests that if Fisheries and Oceans Canada (DFO) decides to limit commercial lobster licenses for conservation reasons, the burden should fall to non-Indigenous fishermen.

1: "We are all Treaty people: Support Mi'kmaq fishers" Spring Mag, 2: R. v. Marshall, 1999 CanLII 665 (SCC), [1999] 3 SCR 456, 3. "Scale of Sipekne'katik fishery won't harm lobster stocks, says prof" CBC, 4: post by Andrea Paul, 5: "Nova Scotia Mi'kmaw lobster harvester to file an injunction against DFO for seizing traps" Kukukwes News, 6: Case Brief: R. v. Sparrow, [1990] 1 S.C.R. 1075, 7: "A line in the ocean and Clearwater's monopoly over 720 tonnes of lobster" CBC News, 8: "Clearwater's Illegal Fishing Brought to Court" EAC, 9: R. v. Marshall, 1999 CanLII 666 (SCC), [1999] 3 SCR 533

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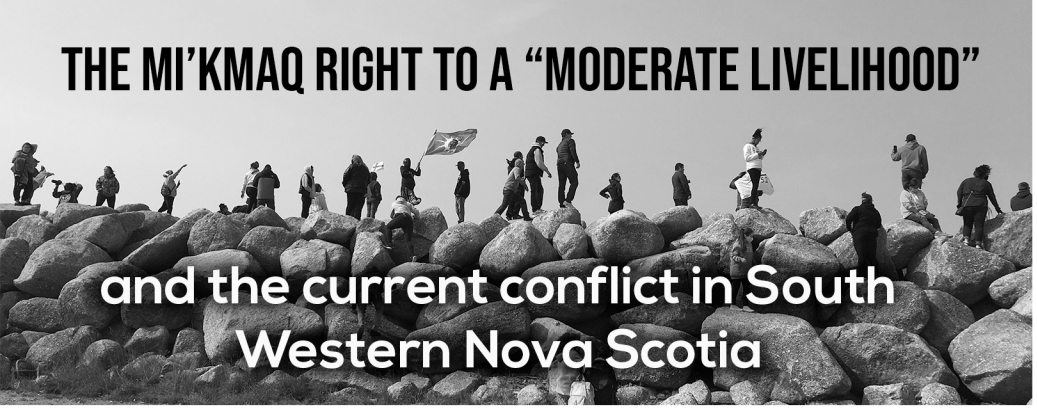

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